

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DAVID GENTRY WALLER	§	
VS.	§	CIVIL ACTION NO. 5:16cv146
DIRECTOR, TDCJ-CID	§	

MEMORANDUM ORDER ADOPTING
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

David Gentry Waller, an inmate confined within the Texas Department of Criminal of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court referred this matter to the Honorable Caroline M. Craven, United States Magistrate Judge, for consideration pursuant to 28 U.S.C. § 636.

Petitioner is challenging a conviction for aggravated assault with a deadly weapon. The Respondent filed a motion asking that the petition be dismissed as barred by the applicable statute of limitations. The Magistrate Judge has submitted a Report and Recommendation of United States Magistrate Judge recommending the motion be granted. Docket No. 14 at 2. The recommendation was based on the Magistrate Judge's determination that Petitioner did not file his application within one year of the date on which his conviction became final.

Petitioner acknowledge receipt of the Report and Recommendation on October 27, 2017. The time for filing objections has elapsed without Petitioner filing any objections to the Report and Recommendation. As no objections were filed, this Court reviews the Magistrate Judge's findings of fact and conclusions of law for plain error. *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

The Court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and pleadings. Having considered the record and the Report, the Court agrees with the Magistrate Judge that the current petition should be dismissed because it is barred by the applicable statute of limitations. Accordingly, finding no clear error in the findings of fact and conclusions of law of the Magistrate Judge, this Court adopts the Magistrate Judge's


findings and conclusions as those of the Court. It is accordingly

ORDERED that the Respondent's motion to dismiss is **GRANTED** and this petition for writ of habeas corpus is **DISMISSED** as barred by the applicable statute of limitations.

Additionally, the Court finds that Petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying post-conviction collateral relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability requires the Petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the Petitioner need not establish that he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the Petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (2000).

In this case, Petitioner has not shown that the issue of whether the current petition is barred by the applicable statute of limitations is subject to debate among jurists of reason, and the questions presented are not worthy of encouragement to proceed further. Therefore, Petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly, a certificate of appealability will not be issued.

So ORDERED and SIGNED this 20th day of November, 2017.



RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE